IN THE SUPREME COURT OF MISSOURI

ST. CHARLES COUNTY, et al.,	)	
	)	
Plaintiffs/Appellants,	)	
	)	
v.	)	No. SC86302
	)	
CITY OF ST. PETERS	)	
	)	
and	)	
	)	
COSTCO WHOLESALE CORPORATION,	)	
	)	
Defendants/Respondents.	)	

Appeal from the Circuit Court of St. Charles County
The Honorable Lucy D. Rauch, Circuit Judge

Substitute Brief of Respondent Costco Wholesale Corporation

James E. Mello #37734
Thomas B. Weaver #29176
Jeffery T. McPherson #42825
Armstrong Teasdale LLP
One Metropolitan Square, Suite 2600
St. Louis, MO 63102
(314)621-5070 FAX (314)621-5065

ATTORNEYS FOR RESPONDENT
COSTCO WHOLESALE
CORPORATION

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JURISDICTIONAL STATEMENT

The Court lacks jurisdiction over the appellants' Point VI. In their notice of appeal and jurisdictional statement, the appellants purported to invoke this Court's exclusive jurisdiction over appeals that involve the constitutional validity of a statute of this state. However, the appellants' initial brief did not assert the constitutional invalidity of any statute, but rather claimed that certain actions of Respondent City of St. Peters were invalid. It is well settled that, on transfer to this Court, an appellant may not "alter the basis of any claim that was raised in the brief filed in the court of appeals." Rule 83.08; *Linzenni v. Hoffman*, 937 S.W.2d 723, 727 (Mo. banc 1997).

In their initial appellants' brief before this Court, which is the brief upon which the Court of Appeals decided the case, the appellants did not raise the constitutionality of the TIF Act. The appellants asserted in their Point V that the City of St. Peters allegedly violated Article VI, sections 23 and 25, of the Missouri Constitution. In their substitute brief in this Court after transfer, the appellants have attempted to change their argument. Now, in their renumbered Point VI, they attempt to claim that "§ 99.845 violates Article VI, §§ 23 and 25 of the Constitution in that § 99.845 permits St. Peters to Use Public Money to assist Costco." This is a blatant attempt to alter the basis of the claim advanced in the initial brief.

In *Blackstock v. Kohn*, 994 S.W.2d 947, 951 (Mo. banc 1999), the appellants attacked a jury instruction on the theory that it was an impermissible contributory-negligence instruction. The Court rejected this claim on the merits. The appellants

attempted to raise another argument that they had not raised prior to transfer from the Court of Appeals, but the Court rejected it for violation of Rule 83.08: "The Blackstocks did not raise this claim before the court of appeals. This Court, therefore, may not review the claim." *Id.* at 953.

As to the other issues raised by the appellants, this Court has jurisdiction to entertain appeals on transfer from the Court of Appeals pursuant to Article V, Section III, of the Missouri Constitution.

STATEMENT OF FACTS

Respondent Costco Wholesale Corporation adopts and joins in the statement of facts in the substitute brief of Respondent City of St. Peters.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT AGAINST THE PLAINTIFFS ON COUNTS I THROUGH V OF THEIR PETITION BECAUSE THE CITY'S ACTIONS WERE IN CONFORMITY WITH THE TIF ACT, THE DETERMINATION OF BLIGHT IS SUPPORTED BY SUBSTANTIAL EVIDENCE AT THE TIME OF THE DETERMINATION AND IS AT LEAST FAIRLY DEBATABLE, AND THE PLAINTIFFS' OBJECTIONS ARE UNTIMELY.

Desloge v. St. Louis County, 431 S.W.2d 126 (Mo. 1968).

St. Louis Public Serv. Co. v. City of St. Louis, 302 S.W.2d 875 (Mo. banc 1957).

Butler v. Mitchell-Hugeback, Inc., 895 S.W.2d 15 (Mo. banc 1995).

II. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT AGAINST THE PLAINTIFFS ON COUNT VI OF THEIR PETITION BECAUSE THE CITY OF ST. PETERS DID NOT VIOLATE ARTICLE VI, SECTION 27(B), OF THE MISSOURI CONSTITUTION IN THAT THE COSTCO OBLIGATIONS ARE NOT "REVENUE BONDS" CONTEMPLATED BY ARTICLE VI, SECTION 27(B).

Mo. Const. art VI, § 27(b).

Tax Increment Financing Commission of Kansas City v.

J.E. Dunn Construction Co., 781 S.W. 2d 70 (Mo. banc 1989).

§ 99.835, RSMo.

§ 99.845, RSMo.

III. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT AGAINST THE PLAINTIFFS ON COUNT VIII OF THEIR PETITION BECAUSE THE CITY DID NOT USE EATS IN VIOLATION OF ARTICLE VI, SECTIONS 23 AND 25, OF THE STATE CONSTITUTION IN THAT ALL EATS INVOLVED IN THE REDEVELOPMENT ARE FOR THE PUBLIC PURPOSES OF REDEVELOPMENT AND ALLEVIATION OF BLIGHT.

Rule 83.08.

Linzenni v. Hoffman, 937 S.W.2d 723 (Mo. banc 1997).

State ex inf. Dalton v. Land Clearance for Redevelopment Auth.,

364 Mo. 974, 270 S.W.2d 44 (banc 1954).

Mo. Const. art VI, § 21.

ARGUMENT

The judgment of the circuit court must be affirmed. The profusion of arguments in the plaintiffs' substitute brief demonstrates the straws at which they are willing to grasp in an after-the-fact effort to invalidate a development that is fully in conformity with the constitution and laws of this state. The plaintiffs' claims are based on a strained and unsupported reading of the governing law. If the Court were to accept the plaintiffs' arguments, scores of tax increment financing projects across the state would be endangered, and the settled expectations of the state legislature, local governments, and private parties would be upset in direct contravention of the law. Limitless municipal determinations of all types, involving the exercise of legislative discretion on many issues other than TIF, would be subject to attack years after the fact. The Court should affirm the summary judgment in favor of the City of St. Peters ("the City") and Costco Wholesale Corporation ("Costco").

For the Court's convenience, and in order to avoid undue proliferation of lengthy arguments, Costco adopts and joins in the arguments in the City's separate brief before this Court. In addition, Costco offers the following brief arguments in opposition to the plaintiffs' claims.

I. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT AGAINST THE PLAINTIFFS ON COUNTS I THROUGH V OF THEIR PETITION BECAUSE THE CITY'S ACTIONS WERE IN CONFORMITY WITH THE TIF ACT, THE DETERMINATION OF BLIGHT IS SUPPORTED BY SUBSTANTIAL EVIDENCE AT THE TIME OF THE DETERMINATION AND IS AT LEAST FAIRLY DEBATABLE, AND THE PLAINTIFFS' OBJECTIONS ARE UNTIMELY.

The plaintiffs' substitute brief is notable in that it contrives to keep its first four points relied on separate from its last three, despite the fact that the issues raised in all these points are inextricably interlinked. Points I through IV of the plaintiffs' substitute brief contain arguments that are all facets of the plaintiffs' core contention that the City should not have undertaken a TIF redevelopment in 1992. The plaintiffs' Points VII through IX all attempt to explain why the plaintiffs should be allowed to raise their objections to the City's 1992 actions for the first time in the year 2000.

Despite the plaintiffs' attempt to separate these issues, they are analytically and legally intertwined. Apart from the baseless constitutional claims that the plaintiffs raise in their Points V and VI, the only issue in this appeal is whether the plaintiffs have properly contested a TIF redevelopment that the City undertook in 1992. Costco's Point I will address this core issue. The plaintiffs' purported constitutional issues will be addressed in the two points that follow.

The plaintiffs' claims run contrary to the settled law of this state. The plaintiffs had notice and a full and fair opportunity to object to the City's redevelopment efforts at every turn. From the proceedings leading to the passage of the blighting ordinance to the issuance of millions of dollars in obligations in support of the redevelopment and the collection of PILOTS and EATS generated by the redevelopment, the plaintiffs knew exactly what was happening at all times. In the legislative proceedings that led to the TIF, the plaintiffs did not object or point to any evidence contrary to the City's determinations. Legislative action, like the ordinances at issue in this case, must be "viewed in the light of the facts existent ***at the time of enactment***." *Desloge v. St. Louis County*, 431 S.W.2d 126, 132 (Mo. 1968) (emphasis added). In 1992, the plaintiffs did not suggest that the ordinances were illegal. Missouri law does not permit legislative action to be undone years after the fact as requested by the plaintiffs.

A. Standard of review.

Appellate review of summary judgment is de novo. *Purcell Tire & Rubber Co. v. Executive Beechcraft, Inc.*, 59 S.W.3d 505, 508 (Mo. banc 2001). If the grant of summary judgment can be sustained under any reasonable theory, a reviewing court must do so even if the trial court reached the correct result for the wrong reasons. *Johnson v. Missouri Bd. of Probation & Parole*, 92 S.W.3d 107, 112 (Mo. App. 2002); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 243 (Mo. banc 1984) ("This court may affirm the trial court if it finds that respondent was entitled to judgment as a matter of law for any reason

appearing in the record."). This standard of review applies to all of the plaintiffs' points relied on discussed in this brief.

B. The County and the public were part of the TIF process.

The plaintiffs ignore the many procedural safeguards provided by Missouri law that permitted St. Charles County and the public at large to have a full and fair opportunity to participate in the TIF process. Under the TIF Act, at least thirty days before the first meeting of the City's TIF Commission, taxing districts (including the County) were given direct written notice of the convening of the TIF Commission to consider the redevelopment plan and had the opportunity to appoint members to the TIF Commission. §§ 99.825, 99.820.2, RSMo.

Prior to the adoption of the TIF ordinances, the TIF Commission was required to hold a public hearing at which any interested person or affected taxing district had the right to file written objections or comments and to be heard orally. § 99.825. Notice of the hearing was required to be sent to the County by certified mail at least forty-five days prior to the hearing. § 99.830. Two public notices of the hearing were required to be published, the first at least thirty days before the hearing and the second at least ten days prior to the hearing. *Id.* After the hearing, the TIF Commission was required to forward its recommendations to the City's Board of Aldermen. § 99.825.3.

At least forty-five days prior to the public hearing, the City was required to file the Redevelopment Plan and Blighting Study with the County. § 99.810.1(1), RSMo. This informed the County regarding the intent to use TIF revenues to fund the development of

the Rec-Plex, listed projects that were intended to eliminate the blight present in the Redevelopment Area, and proposed using both EATs and PILOTs to alleviate the blight. L.F. at 527-601. Under the Missouri Sunshine Law, the Redevelopment Plan and Blighting Study were available for public inspection and copying. § 610.023.1, RSMo.

On December 29, 1992, the Board of Aldermen adopted Ordinance 1961 (approving the redevelopment plan including designation of the redevelopment area and project activities and authorizing the TIF funding mechanism) and Ordinance 1962 (approving the redevelopment agreement). L.F. at 1343-45, 1353-57, 1364-68, 1385-89. The passage of the ordinances was required to be after at least two readings at public meetings of the Board of Aldermen in conformity with the Municipal Code and the notice provisions of the Sunshine Law. §§ 79.130, 610.020.1, RSMo.

The plan was amended four times, each of which required a new round of notices and public hearings by the TIF Commission. The record is not clear on how many meetings were held by each TIF Commission, but the law required at least two for the original plan and each plan amendment, or at least ten TIF Commission meetings. The County would have directly received two notices for each such plan, or ten notices in all. Thus, the County had at least ten opportunities to comment on the TIF Plan and its amendments.

The ordinances went into effect, and the County complied with them for seven years. It is undisputed that St. Charles County collected and remitted the PILOTS and

EATS generated by the redevelopment until it commenced its first action against the City in 2000. L.F. at 1249.

C. The plaintiffs' claims come too late.

The plaintiffs' argument plainly seeks to undermine the entire structure of redevelopment by tax increment financing, contrary to the settled expectations of the legislature, local governments, developers, investors, and the public. Missouri law protects these expectations, as exemplified by the TIF Act, which provides that when TIF obligations have been issued (as in this case), the obligations are conclusive proof that they were properly issued. *See* § 99.835.4, RSMo. ("The ordinance authorizing the issuance of obligations may provide that the obligations shall contain a recital that they are issued pursuant to sections 99.800 to 99.865, which recital shall be conclusive evidence of their validity and of the regularity of their issuance."). The plaintiffs cannot defeat this conclusive presumption by asserting that the TIF procedure in this case was invalid.

The time for the plaintiffs to raise these objections was at the time the City embarked on this redevelopment. As this Court has held, Missouri law does not permit a party to raise complaints about a governmental action years after the fact in the manner attempted by the plaintiffs. Regardless of whether the plaintiffs are said to have waived their objections or been estopped to raise them, one cannot attack an ordinance after voluntarily operating under it for years:

> The rule is well settled that one voluntarily proceeding under a statute or ordinance, and claiming benefits thereby conferred, will not be heard to question its validity in order to avoid its burdens. The same or similar rules have been applied in litigation involving many different types of instruments, licenses, or other transactions. The designation used in referring to this rule or doctrine is obviously unimportant. It is frequently called an estoppel. However, it is akin to the rule against assuming inconsistent positions and it involves the principles of waiver, election, and ratification rather, perhaps, than being limited to the precise principles of equitable estoppel. Regardless of the name of principle designated, the result is clearly the same. It precludes one who accepts the benefits from questioning the validity of the accompanying obligation.

St. Louis Public Serv. Co. v. City of St. Louis, 302 S.W.2d 875, 879 (Mo. banc 1957).

The judgment of the trial court must be affirmed. Regardless of how it is characterized (as waiver or estoppel or laches or limitations), Missouri law does not permit the plaintiffs to inflict the harm they seek under the facts of this case.

As the Court considers the plaintiffs' arguments, it should bear in mind the parties that would be harmed if this TIF were undone, contrary to the settled expectations of everyone involved. Most directly, the plaintiffs' claims threaten $9.9 million in notes payable from the revenues generated by the redevelopment. Costco arrived on the scene in 1998 -- after the City's previous efforts to develop the area failed -- and invested millions of dollars, alleviating many of the conditions that caused the City to pass the

blighting ordinance, in reliance on the validity of Ordinances 1961 and 1962. Further, if the plaintiffs are permitted to invalidate these ordinances now, twelve years after they were enacted, all of the many TIF redevelopments in the state would be subject to an after-the-fact inquiry into the manner of their enactment.

D. Revenue may be collected from the entire redevelopment area.

In their Point I, the plaintiffs claim that it violates the TIF Act for revenue generated in one redevelopment project area to be used to fund redevelopment activities in another redevelopment project area. In addition to being completely erroneous, this argument is certainly one that could have been raised in connection with the decision to undertake the redevelopment in 1992. As noted below, and contrary to the plaintiffs' assertions, ***there are no separate redevelopment project areas***; rather, there is a single redevelopment area. There is no statutory limitation on using revenues generated throughout the area to fund redevelopment activities. Indeed, the TIF Act specifically permits the incremental revenue generated throughout a redevelopment area to be used to satisfy obligations anywhere in that area.

In Count II of their petition, the plaintiffs claimed that the City collected EATS from the entire redevelopment area and used them to retire debt on the Rec-Plex. In Count III, the claim was that the City did the same thing with PILOTS. The plaintiffs' theory was that the Rec-Plex is a separate redevelopment project, and collecting EATS and PILOTS from revenue generated outside the area of the Rec-Plex violates the TIF Act.

The plaintiffs' claims are rebutted by section 99.835 of the TIF Act, which provides that the City has the right to determine the manner in which TIF revenues are used. Section 99.835 provides that TIF obligations "shall be retired in the manner provided in the ordinance or resolution authorizing the issuance of such obligations." The section goes on to provide that a municipality may "pledge all or any part of the funds in and to be deposited in the special allocation fund . . . to the payment of the redevelopment costs and obligations." Thus, by the plain terms of the statute, "***all or any part***" of the entire special allocation fund, regardless of the area from which it is generated, is available to retire TIF obligations as the City sees fit. Nothing in the TIF Act places a geographic limitation on the source of funds for such purposes.

Furthermore, section 99.820.1(2) provides that the City has the power to "make and enter into all contracts necessary or incidental to the implementation and furtherance of its redevelopment plan or project." This permits the City to enter into contracts (for instance, entering into redevelopment agreements or issuing TIF obligations) for the payment of redevelopment costs. Again, there is no limitation on the source of funds available for satisfaction of such contracts.

The plaintiffs' argument also ignores the fact that the City designated only one redevelopment area from which EATS and PILOTS are derived. This area encompasses the entire redevelopment, and there is no geographic limitation on how the special allocation fund may be used, as long as it is used for redevelopment purposes. Further, there is no obligation on the City to establish separate redevelopment project areas, and

no limit on the number of redevelopment activities that may be conducted in the redevelopment area. There is simply no statutory support for the violation that the plaintiffs purport to identify.

E. The PILOTS are not illegal assessments.

In their Point I, for the first time on appeal, the plaintiffs assert that the City cannot collect PILOTS from the redevelopment area on the theory that PILOTS collected from the redevelopment area to finance the Rec-Plex provide no special or economic benefit to private landowners as a result of the construction of the Rec-Plex. The plaintiffs do not attempt to extend this argument to Costco's development, nor could they in light of the fact that Costco's activities indisputably benefit the private property within the redevelopment area.

Further, this claim does not appear in the eight counts of the plaintiffs' petition, L.F. at 16-34, and therefore is not properly before the Court. In re *J__ Y__*, 637 S.W.2d 670, 673 (Mo. banc 1982); *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 36 (Mo. banc 1982). This freshly-minted argument was never advanced when the City was determining whether to pass Ordinances 1961 and 1962.

The plaintiffs claim that PILOTS collected from the redevelopment area are invalid because the redevelopment area has not benefited. This assertion is based on the claim that, after the redevelopment activities were undertaken, the redevelopment area increased in value at the same rate as the rest of the county. But the plaintiffs ignore the fact that the area was ***blighted*** prior to the redevelopment. Under these circumstances,

increasing in value at the same rate as the rest of the county is a triumph, demonstrating that the redevelopment has been effective. This certainly shows a special benefit to the property in the redevelopment area.

The foreign cases cited by the plaintiffs merely show that, under whatever law was applicable in the state of Washington in 1965, a public library could not be financed by assessments, *Heavens v. King County Rural Library Dist.*, 404 P.2d 453 (Wash. 1965), and that under whatever law was applicable in the state of Arkansas in 1923, a court rejected the use of assessments to pay for a public auditorium, *Lipscomb v. Lenon*, 276 S.W. 367 (Ark. 1925).

These foreign cases do not have any relevance to this state's modern law of redevelopment. Further, they do not accord with this state's law relating to assessments. In the plaintiffs' own cited case of *City of Webster Groves v. Taylor*, taxpayers objected to a sewer district's assessments on their property ***because their land would not even drain into the sewers***. 321 Mo. 955, 13 S.W.2d 646 (1929). This Court nevertheless held that the assessments on the taxpayers' property were appropriate since the taxpayers might derive an indirect benefit:

> But, if it be true that no water falling on respondents' lot will find its way into the sewers in question, it does not follow that no benefits will accrue to the property through their construction. If the lands immediately adjoining are drained, the beneficial effects of such drainage will inure in an appreciable way to defendants' property. Storm water sewer district No. 1 is possibly but a unit in a

> comprehensive plan adopted for the drainage of the entire city; and the city council, in the exercise of its discretion, had no doubt a valid reason for including defendants' property in this district rather than in some other.

Id., 13 S.W.2d at 648.

In the *Webster Groves* case, this Court emphasized the high burden of showing the invalidity of a legislative determination relating to assessments:

> From the foregoing brief summarization it is manifest that the evidence is wholly insufficient to show that the city council's action, in including respondents' property in the sewer district in question, was fraudulent, or arbitrary, or devoid of any reasonable basis, or a palpable abuse of power. . . . The judgment of the trial court in annulling and setting aside, in effect, the legislative action of the city council is therefore without the support of either allegation or proof.

Id.

The plaintiffs' unpreserved claim seems to be that the PILOTS collected from the property in the redevelopment area are illegal taxes on the theory that the landowners in the redevelopment area have not benefited from the construction of the Rec-Plex. In adopting the redevelopment, however, the City explicitly determined that the area ***would*** benefit. As the plaintiffs' own cited cases shows, the Court cannot interfere with this legislative determination unless it is "clearly erroneous and unreasonable." *Burks v. City of Licking*, 980 S.W.2d 109, 112 (Mo. App. 1998); *see Webster Groves*. Under this

point, the plaintiffs have made no effort to show that the City's legislative determination was invalid.

Burks emphasizes the City's legislative discretion. *Burks* holds that the city has the discretion to purchase property outside of its borders for city purposes, rejecting a plaintiff's objection to the purchase of property for use in the development of a state prison that would serve the valid municipal purpose of promoting the city's economic development. *Burks* does not advance the plaintiffs' argument in this case.

The plaintiffs purport to rely on *Tax Increment Fin. Comm'n v. J.E. Dunn Constr. Co.*, 781 S.W.2d 70 (Mo. banc 1989), the leading case that upholds the constitutionality and public purposes of the TIF Act. In *Dunn*, this Court noted the authorization conferred on the General Assembly by Article VI, Section 7 of the Missouri Constitution to provide tax relief for the reconstruction, redevelopment, and rehabilitation of obsolete, decadent, or blighted areas. This power permits PILOTS for the public purpose of redevelopment: "[I]ncluded within that power is the authority to redirect the revenues attributable to improvements for the purposes enumerated in art. X, §7. The PILOTS are the General Assembly's mechanism for addressing the problems of blight, obsolescence and decay, particularly within, though not limited to, the urban setting here. The Act is consistent with the Constitution." 781 S.W.2d at 76. The Court also rejected the contention that the use to which the land within the tax increment financing district would be put was not a public purpose. *Id.* at 78-79.

In the *Dunn* case, this Court explicitly rejected the plaintiffs' claims as to the constitutionality of PILOTS being used for redevelopment purposes. "Dunn argues that the Act authorizes an unconstitutional diversion of tax proceeds for 'non-public purposes.' If PILOTS are not taxes--and we hold here that they are not--it follows that the Act cannot require an unlawful diversion of taxes. For the reasons stated, we reject Dunn's 'non-public purpose' argument as well." 781 S.W.2d at 77 n.4. *Dunn* plainly does not aid the plaintiffs in this case.

The plaintiffs also cite *City of Springfield v. Bradley*, 744 S.W.2d 559, 561-62 (Mo. App. 1988), in which there was a satisfactory sewage disposal system in the area before a sewer district attempted to enforce an assessment on the taxpayer's property. Indeed, the defendants' property was connected to a city-owned sewer line so that the defendants were not benefited by a second sewer system. Under these circumstances in which the land plainly was not benefited by a redundant sewer system, the Southern District held the assessment to be unenforceable. In this case, by contrast, there is no such evidence of redundant benefit to the redevelopment area.

The last case on which the plaintiffs' purport to place primary reliance is *Crittenton v. Reed*, 932 S.W.2d 403 (Mo. banc 1996), in which an assessment was not challenged for any alleged failure to benefit the property assessed; rather, the Court held that an assessment is really a tax if it bears no relation to the actual cost of the improvements for which the assessment was imposed: 932 S.W.2d at 405. This was significant because the legislative body had not made any determination on the issue: "In

this case, neither a legislative determination nor any evidence demonstrates that the amount of the special assessments was based on the cost of maintenance, repair and improvements. The special assessments in this case are general taxation." *Id.* In this case, by contrast, there is a valid legislative determination, supported by ample evidence, that the area will benefit.

F. PILOTS may be used to fund public improvements.

The plaintiffs' Point III (Count IV of petition) is based on the novel theory that the TIF Act prohibits PILOTS from being used for the construction of public facilities like the Rec-Plex. The plaintiffs do not dispute that Costco's development is a private use, They do not deny that Costco is entitled to reimbursement under this point.

Contrary to the plaintiffs' claim, at all relevant times, the TIF Act permitted (and permits) the use of PILOTS to fund public improvements. The plaintiffs' contention willfully ignores the law. The propriety of this use of PILOTS is shown by the fact that the plaintiffs did not raise this argument when the development was undertaken or for the first several years that the County collected and remitted the PILOTS without objection.

Under basic principles of statutory construction, this Court seeks to harmonize statutes relating to the same subject. *Farmers' Elec. Coop., Inc. v. Missouri Dept. of Corrections,* 977 S.W.2d 266, 270 (Mo. banc 1998). Statutory provisions relating to the same subject matter are considered in pari materia and are to be construed together. *Reece v. Reece,* 890 S.W.2d 706, 709-10 (Mo. App. 1995). Statutes in pari materia are

intended to be read consistently and harmoniously. *Id.* at 710. Thus, the Court must construe all of the related provisions of the TIF Act in order to determine its meaning.

When a statute is unambiguous, courts must give effect to the language used by the legislature. *Keeney v. Hereford Concrete Prods., Inc.*, 911 S.W.2d 622, 624 (Mo. banc 1995); *see Hughes Dev. Co. v. Omega Realty Co.*, 951 S.W.2d 615, 617 (Mo. banc 1997). The Court must consider the words of the statute in their plain and ordinary meaning. *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo. banc 1995). Courts are without authority to read into a statute a legislative intent contrary to the intent made evident by the statute's plain language. *Kearney Special Road Dist. v. County of Clay*, 863 S.W.2d 841, 842 (Mo. banc 1993). In this case, the TIF Act unambiguously permits the City to use PILOTS to fund public improvements.

It is undisputed that section 99.805 has always provided that redevelopment project costs (which may be paid from the special allocation fund) include "costs of construction of public works or improvements." Further, section 99.820 specifically provides that a municipality may "acquire and construct public facilities within a redevelopment area." As discussed at length in the City's brief, until 1990 the TIF Act did not authorize a source of funds for the satisfaction of these costs other than PILOTS. The definition of PILOTS and the scope of redevelopment project costs contained the same language prior to the 1990 amendments. The plaintiffs do not explain how PILOTS suddenly could have become unavailable for public purposes.

Further, section 99.840.2 specifically provides that "in the event a municipality issues obligations under home rule powers or other legislative authority, the proceeds of which are pledged to pay redevelopment project costs, the municipality may . . . retire such obligations from funds in the special allocation fund in amounts and in such manner as if such obligations had been issued pursuant to the provisions of [the TIF Act]." This section clearly authorizes the use of TIF financing to retire the Rec-Plex general obligation bonds approved independently of the adoption of the TIF.

The redevelopment plan was created to eliminate blight and included the area where the Rec-Plex was built. The Rec-Plex was part of the strategy to encourage private investment by causing roads and infrastructure to be developed and thereby eliminate conditions of blight and increase the tax base. It is common for cities to make public investments to cause private investment, and the TIF Act not only allows but also contemplates and encourages such investment. The plaintiffs' argument would mean that a city could not build a fire station to provide better safety to an area of town and thereby encourage a company to locate there. The same could be said of a water tower, or a well, or a road. The fact that the City was willing to back its investment with general obligation bonds shows a high level of commitment to support the redevelopment effort, of which the Rec-Plex was a part, even if it meant that taxpayers had to support the effort initially until the public improvements were in place and private investment followed. The TIF Act was created in order to foster such development, and the plaintiffs' arguments to the contrary must be rejected.

G. The TIF Act did not require the City to designate additional redevelopment project areas in Ordinances 1961 and 1962.

In Point II of their brief (referring to Count I of their petition), another argument that was not raised when the City was enacting Ordinances 1961 and 1962, the plaintiffs claim that the City violated the TIF Act by failing to include legal descriptions of the Rec-Plex and Mid-Rivers Mall expansion "projects." This argument ignores the facts. As shown by the undisputed facts discussed at length in the City's brief, the three "projects" identified by the plaintiffs are activities that are part of one "redevelopment project" area as that term is used in the TIF Act. All of these activities occurred in a single redevelopment area, the legal description of which was fully set forth. The City met the statutory requirement of providing a legal description. The plaintiffs' unsupported assertion that the City was required to set forth a legal description of the area of every redevelopment ***activity*** is contrary to the TIF Act and must be rejected.

Contrary to the plaintiffs' contentions, the City's decision not to use separately described redevelopment project areas is laudable. Where TIF is adopted, the statutory limit for capturing revenue is 23 years. § 99.845, RSMo. Under the statute, a city has ten years from adoption of a redevelopment area and plan to approve a project and activate the TIF. St. Peters activated the TIF at the time that the area, plan, and projects therein were approved in 1992.

The procedure of designating separate redevelopment project areas with separate legal descriptions exists to permit cities to start the 23-year clock anew for the new

projects. In this case, however, the City did not exercise this option, which was certainly available. Rather, even though Costco did not come on the scene and receive TIF obligations until years after the 1992 inception of the redevelopment, Costco was limited to the time remaining, not 23 more years, in which to recover its costs. The result is a benefit to all of the affected taxing jurisdictions, which will begin receiving additional tax revenues generated by the redevelopment sooner.

As shown by the exhaustive review of the statutory history in the City's brief, the TIF Act does not require every development activity to have a separate legal description. Rather, the TIF Act requires a description of the redevelopment area, with any number of redevelopment activities permitted therein. Because the City's plan is fully in conformity with the law, the defendants were entitled to summary judgment on Count I.

Notably, the plaintiffs do not raise any legal-description claims as to Costco's development activities. This is because, while it is not denominated as a "redevelopment project area," the area of Costco's development ***is*** legally described. *See* City's Exhibits 4, 7, 8. It is undisputed that the Costco development would meet the criteria for "redevelopment project area," if that were necessary. As noted, however, there is no such requirement. This was done so that a sub-account of the special allocation fund could be set up in order to earmark funds generated by Costco's development to be used first to reimburse Costco for redevelopment project costs, with remaining TIF revenues available to be used for other redevelopment activities provided for in the TIF plan. *See* City's Exhibits 4, 7, 8. The TIF Act gives cities flexibility in redeveloping blighted areas; the

facts of this case demonstrate that the City properly exercised that flexibility in structuring a redevelopment plan for the entire area.

In their statement of points relied on, the plaintiffs list exactly two cases among the authority upon which they principally rely in connection with this argument. One is *ITT Commercial Finance*, which merely sets forth the standard of review and has nothing to say about construction of the TIF Act. The only other case the plaintiffs purport to rely on is *Ste. Genevieve School District v. Board of Aldermen of City of Ste. Genevieve,* 66 S.W.3d 6, 9 (Mo. banc 2002). The plaintiffs devote a single sentence in their brief to the *Ste. Genevieve* case, which raises only the technical issue of whether, under the TIF Act, a city had authority to amend a redevelopment project without reconvening the TIF commission. *Id.* at 9. The *Ste. Genevieve* case is not relevant here.

H. The City's determination of blight was proper.

The City adopted a redevelopment plan ("the Plan") by passing Ordinance No. 1961 (the "Blighting Ordinance"). In Count V of their petition, years after the ordinance was passed, the plaintiffs challenged the City's findings with respect to the Blighting Ordinance and the Plan. The plaintiffs alleged, long after the fact, that the City's finding of blight was at least arbitrary and may have been made in bad faith.

These contentions are squarely contrary to the undisputed facts, which demonstrate that the City properly found the area to be blighted. Chief among these undisputed facts is the plaintiffs' acquiescence at the time the Blighting Ordinance was enacted. If the plaintiffs truly believed that the area was not blighted in 1992, they surely

would have raised the issue in opposition to the passage of the Blighting Ordinance. If the finding of blight was so obviously arbitrary or fraudulent in 1992, the plaintiffs certainly would have presented evidence to this effect to the Board of Aldermen. Yet the record is bereft of evidence from 1992 or earlier to contradict the findings of the Board of Aldermen.

In passing the Blighting Ordinance, the City's Board of Aldermen acted in its legislative capacity. Judicial review of a legislative finding is limited to "a determination of whether the action was arbitrary, the result of fraud, collusion, or bad faith, or whether the City exceeded its power." *Maryland Plaza Redevelopment Corp. v. Greenberg*, 594 S.W.2d 284, 287 (Mo. App. 1979). "The issue of whether a legislative determination of blight is arbitrary turns upon the facts of each case. And, the burden of proving that it is arbitrary is upon the party so charging." *Allright Missouri, Inc. v. Civic Plaza Redevelopment Corp.*, 538 S.W.2d 320, 324 (Mo. banc 1976).

"It must be kept in mind that the courts cannot interfere with a discretionary exercise of judgment in determining a condition of blight in a given area." *Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corp.*, 518 S.W.2d 11, 16 (Mo. 1974). If a legislative decision is even "reasonably doubtful or fairly debatable," then a court will not substitute its opinion for that of the Board. *JG St. Louis West Limited Liability Company v. City of Des Peres*, 41 S.W.3d 513, 517 (Mo. App. 2001).

The plaintiffs' argument in this Court does not present any basis for reversal of the judgment of the trial court. Legislative action must be "viewed in the light of the facts

existent ***at the time of enactment***." *Desloge v. St. Louis County*, 431 S.W.2d 126, 132 (Mo. 1968) (emphasis added); *see Elam v. City of St. Ann*, 784 S.W.2d 330, 335 (Mo. App. 1990); *R. A. Vorhof Constr. Co. v. Black Jack Fire Protection Dist.*, 454 S.W.2d 588, 591 (Mo. App. 1970). In their point relied on, however, the plaintiffs assert that the declaration of blight in 1992 was in bad faith or arbitrary (they are not sure which) because of conditions that exist ***today***. Their point relied on asserts that the blighting determination was improper "in that the SPCRA TIF District ***Does not*** Contain a Predominance of Land that ***is*** Blighted." Appellants' Point IV (emphasis added). As noted, however, the law requires this Court to determine whether the decision of the Board was arbitrary or even fairly debatable at the time the decision was made. The plaintiffs' point does not preserve any issue for review.

The TIF Act permits the City twenty-three years in which to alleviate conditions of blight. Those efforts began in 1992 and continue at this moment. Other than the twenty-three-year limitation, there is no provision of the TIF Act that requires the City to undertake the redevelopment in any particular order or in any particular time frame. The plaintiffs claim that, until the Costco project was commenced, none of the blighting conditions were alleviated. This argument seems to suggest that, if the Costco project had been commenced immediately, there would be no alleged arbitrariness or bad faith. But the TIF Act permits the City the flexibility to determine the order and scope of redevelopment activities. It also permits the City to undertake public improvements for the purpose of redevelopment before an appropriate private developer is selected. The

TIF Act and this Court's precedents do not permit a city's legislative determination to be undermined in the manner suggested by the plaintiffs.

In paragraph 64 of their petition, the plaintiffs alleged several reasons (subparts a through g) why the Board's decision was purportedly arbitrary and/or in bad faith. The plaintiffs' allegations are clearly refuted by the facts, findings, and information contained in the Plan (the City's Exhibit 2). The Plan contains a section entitled "Analysis of Blighting Factors," which is a nine-page discussion of the Board's findings supporting the Blighting Ordinance. To summarize, the blighting factors include: (1) defective or inadequate street layout; (2) deterioration of site improvements; (3) obsolete platting; (4) presence of structures below minimum code standards; (5) excessive vacancies; and (6) inadequate utilities. The Board's finding is indisputably based on substantial evidence contained in the Plan. John Brancaglione, a professional urban consultant, researched the area and prepared the Plan that contains facts, findings, and conclusions relative to the existence of blight within the area. (See the City's Exhibit 3). Under these undisputed facts, the Board's decision certainly was not arbitrary and was, at a bare minimum, fairly debatable.

As the court held in *Maryland Plaza*, a party's allegation that a redevelopment area contains "properties which were not in themselves blighted is legally insufficient." 594 S.W.2d at 288. It is well-settled that "an area may be declared blighted even though it may contain structures which would not fall within the definitional ambit of blight." *Id.*; *see also Parking Systems*, 518 S.W.2d at 15 ("In order to have a blighted area it is not

necessary that the total area, or any particular portion of it, constitute what is generally known as a slum.”). The undisputed facts clearly support the finding of the Board that the Area had not been subject to growth and development through investment by private enterprise, and would not reasonably be anticipated to be developed without adoption of the Plan. The Plan provides overwhelming support for that finding.

II. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT AGAINST THE PLAINTIFFS ON COUNT VI OF THEIR PETITION BECAUSE THE CITY OF ST. PETERS DID NOT VIOLATE ARTICLE VI, SECTION 27(B), OF THE MISSOURI CONSTITUTION IN THAT THE COSTCO OBLIGATIONS ARE NOT "REVENUE BONDS" CONTEMPLATED BY ARTICLE VI, SECTION 27(B).

In Count VI of their petition, the plaintiffs alleged that the City's plan for repayment of the principal and interest on the Costco financial obligations violates Article VI, Section 27(b), of the Missouri Constitution. The plaintiffs alleged there had been no voter approval of the obligations and that the City planned to use EATS and PILOTS to repay the principal and interest of such obligations when EATS and PILOTS are not revenues derived from "the lease or other disposal of the facility." These contentions were properly rejected by the trial court.

Article VI, section 27(b) relates to industrial revenue bonds to finance a city facility to be leased to a private party. The section has nothing to do with obligations issued under the TIF Act to fund activities and developments designed to eliminate blight. It provides:

> Any county, city or incorporated town or village in this state, by a majority vote of the governing body thereof, may issue and sell its negotiable interest bearing revenue bonds for the purpose of paying all or part of the cost of purchasing, constructing, extending or improving any facility to be leased or otherwise

> disposed of pursuant to law to private persons or corporations for the manufacturing, commercial, warehousing and industrial development purposes, including the real estate, buildings, fixtures and machinery. The cost of operation and maintenance and the principal and interest of the bonds shall be payable solely from the revenues derived by the county, city, or incorporated town or village from the lease or other disposal of the facility.

In *Tax Increment Financing Commission of Kansas City v. J.E. Dunn Construction Co.*, 781 S.W. 2d 70 (Mo. banc 1989), a plaintiff raised an argument that the TIF Act violated the constitution. This Court concluded that Article VI, section 27(b), permits a city to issue bonds "upon approval of its governing body." *Id.* Voter approval is not required.

Furthermore, the Redevelopment Agreement between Costco and St. Peters anticipates TIF-backed obligations shall be payable "solely from the revenues derived" from PILOTS and EATS generated from the Costco property. (See the City's Exhibit 4). Thus, "TIF Revenues" defined in the Costco Redevelopment Agreement are limited to those PILOTS and EATS from within the area of the Costco redevelopment. *Id.* at 5. Those "TIF Revenues" are the sole source of funds for the payment of obligations supporting the Costco redevelopment, *id.* at 16, not the general revenues and full faith and credit of the City, which would necessitate voter approval.

Indeed, because the Costco obligations are not the "revenue bonds" contemplated by Article VI, section 27(b), the obligations are not subject to that section's limitations on

repayment. Rather than being limited to payment "from the lease or other disposal of the facility," TIF obligations may be repaid from the proceeds of EATS and PILOTS in the special allocation fund. *See* § 99.845. This statutory authority is derived directly from the state constitution, which provides that laws (like the TIF Act) and ordinances (like those passed by the City) may be enacted "for the clearance, replanning, reconstruction, redevelopment and rehabilitation of blighted, substandard or insanitary areas, and for recreational and other facilities incidental or appurtenant thereto, and for taking or permitting the taking, by eminent domain, of property for such purposes . . . ." Mo. Const. art. VI, § 21.

By their terms, the TIF Act and Article VI, section 21, are applicable to this development for the alleviation of blight. This is in contrast to the *Dunn* case, in which section 27(b) applied to industrial revenue bonds issued for a facility to be owned by the city. 781 S.W. 2d at 74.

Missouri law provides a conclusive presumption that the Costco obligations are valid. The recital that obligations were authorized by the TIF Act is conclusive proof that they were properly issued. *See* § 99.835.4, RSMo. ("The ordinance authorizing the issuance of obligations may provide that the obligations shall contain a recital that they are issued pursuant to sections 99.800 to 99.865, which recital shall be conclusive evidence of their validity and of the regularity of their issuance."). The Costco obligations contain this recital. The plaintiffs cannot defeat this conclusive presumption of validity by asserting that the TIF procedure in this case was invalid.

III. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT AGAINST THE PLAINTIFFS ON COUNT VIII OF THEIR PETITION BECAUSE THE CITY DID NOT USE EATS IN VIOLATION OF ARTICLE VI, SECTIONS 23 AND 25, OF THE STATE CONSTITUTION IN THAT ALL EATS INVOLVED IN THE REDEVELOPMENT ARE FOR THE PUBLIC PURPOSES OF REDEVELOPMENT AND ALLEVIATION OF BLIGHT.

In Count VIII of their petition in the trial court, the plaintiffs claimed that the EATS provisions of the TIF Act violated Article VI, sections 23 and 25, of the Missouri Constitution, which prohibit the General Assembly and political subdivisions of the state from granting public money or property or lending public credit to private individuals. In their initial brief in this appeal, however, the appellants did not raise this issue. Their initial Point V asserted only that "St. Peters' Use of EATS violates Article VI, §§ 23 and 25 of the Constitution." There was no claim that any state statute was unconstitutional, and in particular no assertion that any provision of the TIF Act was unconstitutional. The appellants' baseless argument related to the actions of the City of St. Peters, not to the constitutional validity of any state law.

On transfer to this Court, an appellant may not "alter the basis of any claim that was raised in the brief filed in the court of appeals." Rule 83.08; *Linzenni v. Hoffman,* 937 S.W.2d 723, 727 (Mo. banc 1997); *Blackstock v. Kohn,* 994 S.W.2d 947, 951 (Mo.

banc 1999). Consequently, as noted in Costco's jurisdictional statement, the Court lacks jurisdiction over Point VI of the appellants' substitute brief.

In addition to being waived, the plaintiffs' Point VI is also baseless. According to the plaintiffs' petition, "taxes are effectively pledged as the ultimate security for the retirement of the TIF obligation," and therefore EATS "purport[] to authorize the lending of public credit and the granting of public moneys in violation of Article VI, §§ 23 and 25." L.F. at 33. This argument must be rejected because it is the settled law of this state, as shown by decisions of this Court going back decades, that redevelopment programs for the elimination of blighted areas are constitutional.

The plaintiffs' argument reflects a fundamental misunderstanding of the TIF Act and the mechanism provided by the General Assembly for addressing the problems of blight, obsolescence, and decay. A redevelopment plan cannot be adopted without the city finding that the redevelopment area on the whole constitutes a blighted area, a conservation area, or an economic development area (as those terms are defined in the TIF Act) "and has not been subject to growth and development through investment by private enterprise and would not reasonably be anticipated to be developed without the adoption of tax increment financing." § 99.810(1), RSMo.

Accordingly, a city is authorized to issue obligations secured by the special allocation fund for the redevelopment project area to provide for redevelopment costs. § 99.835.1, RSMo. Payments in lieu of taxes are made by the developer (based on the increase in the assessed valuation of the redevelopment area resulting from the

improvements made pursuant to the redevelopment plan) and are deposited into the special allocation fund. § 99.845.3, RSMo. The revenue in the special allocation fund is used to retire the obligations issued to pay for the redevelopment costs.

TIF obligations, whether in the form of notes, bonds or other evidences of indebtedness, are payable solely from the special allocation fund:

> Neither the municipality, its duly authorized commission, the commissioners or the officers of a municipality nor any person executing any obligation shall be personally liable for such obligation by reason of the issuance thereof. The obligations issued pursuant to Sections 99.800 to 99.865 shall not be a general obligation of the municipality, county, state of Missouri, or any political subdivision thereof, nor in any event shall such obligation be payable out of any funds or properties other than those specifically pledged as security therefor. The obligations shall not constitute indebtedness within the meaning of any constitutional, statutory or charter debt limitation or restriction.

§ 99.835.5, RSMo.

Thus, reimbursement for redevelopment costs incurred by the developer is totally dependent on the success of the redevelopment project in generating new revenues by way of an increase in the assessed valuation. Only that "increment" is available for payment of the TIF obligations. If an "increment" is not produced, the developer receives nothing.

Tax Increment Fin. Comm'n v. J.E. Dunn Constr. Co., 781 S.W.2d 70 (Mo. banc 1989), is merely one in a long line of decisions of this Court that have held that the redevelopment of blighted areas and the fostering of economic development constitute a public purpose. It has been the settled law of this state, since at least 1954, "that the primary purpose of a redevelopment project is a public purpose, and that any benefits to private individuals are merely incidental to the public purpose." *State ex inf. Dalton v. Land Clearance for Redevelopment Auth.*, 364 Mo. 974, 270 S.W.2d 44, 53 (banc 1954). If the purpose of a governmental act is public, the fact that benefits may accrue to some private persons does not deprive the government action of its public character. *State ex rel. Atkinson v. Planned Industrial Expansion Auth.*, 517 S.W.2d 36, 45 (Mo. banc 1975). Improved employment and stimulation of the economy serve essential public purposes. *State ex rel. Jardon v. Industrial Dev. Auth.*, 570 S.W.2d 666, 675 (Mo. banc 1978).

The Missouri Constitution itself explicitly recognizes the public benefits of redevelopment, authorizing the taking of private property by eminent domain for the purpose of "clearance, replanning, reconstruction, redevelopment and rehabilitation of blighted, substandard or insanitary areas." Mo. Const. art VI, § 21; *see Annbar Assoc. v. West Side Redevelopment Corp.*, 397 S.W.2d 635 (Mo. banc 1965).

The plaintiffs disregard the public purpose embodied in the TIF Act. A redevelopment plan represents the comprehensive program of a city to reduce or eliminate blighted areas and to enhance the tax bases of the taxing districts which extend into the redevelopment area. § 99.805(12), RSMo. The tool of tax increment financing

authorized by the TIF Act to achieve these objectives represents the legislative declaration of public purpose. The plaintiffs' failure to acknowledge this determination cannot detract from the legislative mandate.

Article VI, sections 23 and 25, state that no city may lend its credit or grant public money or property to or in aid of any private corporation, association, or individual, except as provided in the Missouri Constitution. This Court has long explicitly held that redevelopment plans do not violate Article VI, sections 23 and 25. *Dalton*, 270 S.W.2d at 52-53; *Jardon*, 570 S.W.2d at 674, 676; *Dunn*, 781 S.W.2d at 79.

As noted, in making its determination that an area is blighted, and in approving the redevelopment plan, the Board acted in its legislative capacity. *Crestwood Commons Redevelopment Corp. v. 66 Drive-In, Inc.*, 812 S.W.2d 903, 910 (Mo. App. 1991). Judicial review is limited to whether the legislative determination was arbitrary or was induced by fraud, collusion, or bad faith or whether the City exceeded its powers. *Id.* Courts cannot interfere with a discretionary exercise of judgment in determining a condition of blight in a given area. *Id.* Unless it appears that the conclusion of the Board is clearly arbitrary, the Court cannot substitute its opinion for that of the Board. *Id.* "If the Board's action is reasonably doubtful or even fairly debatable we cannot substitute our opinion for that of the Board." *Id.* The plaintiffs have made no showing that the Board abused its discretion in determining that the redevelopment in this case was for a public purpose.

The redevelopment at issue here exists for the public purpose of redevelopment. The Board found that it was necessary and advisable and in the best interests of the City and its inhabitants to undertake the redevelopment. This legislative finding is conclusive if it is even fairly debatable, regardless of whether benefits may accrue to some private persons. *Id.*; *Dalton*, 270 S.W.2d at 52; *Atkinson*, 517 S.W.2d at 45. The plaintiffs' failure even to contest this finding dooms their constitutional claim.

The plaintiffs' contentions are refuted by the settled law of this state. Thus, summary judgment was properly entered against the plaintiffs on Count VIII.

CONCLUSION

Through this action, the plaintiffs seek to have the Court declare the City's redevelopment invalid. This is a request to cast doubt on the validity of scores of TIF projects throughout the state. The plaintiffs' strained and incomplete readings of statutes and the state constitution do not support this draconian relief. Literally hundreds of legislators, lawyers, and judges have gone over the state's TIF projects with a fine-tooth comb, and it is inconceivable that all of them have been blind to the defects that the plaintiffs purport to have discovered. The Court should reject the invitation to invalidate the many beneficial TIFs that are operating throughout the state.

The judgment of the trial court should be affirmed.

Respectfully submitted,

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James E. Mello #37734
Thomas B. Weaver #29176
Jeffery T. McPherson #42825
Armstrong Teasdale LLP
One Metropolitan Square, Suite 2600
St. Louis, MO 63102
(314)621-5070 FAX (314)621-5065

ATTORNEYS FOR RESPONDENT
COSTCO WHOLESALE
CORPORATION

CERTIFICATE OF SERVICE

A copy of this brief and a disc containing a copy of this brief were mailed, first-class postage prepaid, on December 10, 2004, to:

Joann Leykam, Esq.
Office of the St. Charles County Counselor
100 North Third Street, Suite 216
St. Charles, MO 63301

The Honorable Edward D. Robertson, Jr.
Bartimus, Frickleton, Robertson & Obetz, P.C.
200 Madison, Suite 1000
Jefferson City, MO 65101-3254

James Borchers, Esq.
Stuhlers & Borchers, P.C.
1603 Boone's Lick Road
St. Charles, MO 63301

David Hamilton, Esq.
Hazelwood & Weber LLC
200 North Third Street
St. Charles, MO 63301

Michael T. White, Esq.
White, Goss, Bowers, March, Schulte & Weisenfels
4510 Belleview, Suite 300
Kansas City, MO 64111

Paul Wilson, Esq.
Office of the Attorney General
Broadway State Office Building
P.O. Box 899
Jefferson City, MO 65102

_____

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Brief of Respondent Costco Wholesale Corporation includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 9719 excluding the cover page, signature block, and certificates of service and compliance.